

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**TANYA VANN**

Claimant

VS.

**SOUTHWESTERN BELL TELEPHONE**

Respondent,  
Self-Insured

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Docket No. 256,832

**ORDER**

Respondent appealed the April 15, 2002 Award and the April 17, 2002 Nunc Pro Tunc Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on October 23, 2002. Gary M. Peterson of Topeka, Kansas, was appointed and participated in this claim as Board Member Pro Tem.

**APPEARANCES**

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are set forth in the April 15, 2002 Award and the April 17, 2002 Nunc Pro Tunc Award.

**ISSUES**

This is a claim for a June 10, 2000 accident. On that date, claimant fell as she stood up from a curb and began walking into respondent's office building. In the Award and the Nunc Pro Tunc Award, Judge Avery granted claimant benefits for an eight percent permanent partial disability to her left lower leg.

Respondent contends the Judge erred by finding this claim compensable. Respondent argues that claimant was on her way to work and that claimant's request for benefits should be denied as claimant has failed to prove an exception to the "going and coming rule." Also, at oral argument to the Board, respondent challenged the Judge's disability finding. Accordingly, respondent requests the Board to reverse the Award and

the Nunc Pro Tunc Award and deny claimant's request for benefits. In the alternative, respondent requests the Board to reduce the permanent partial disability rating to three percent.

Conversely, claimant contends claimant's permanent partial disability rating should be increased to 13 percent. Claimant also argues that the facts establish two exceptions to the "going and coming rule." First, claimant contends her accident occurred on respondent's premises. Second, claimant contends she was on the only available route to work, which entailed a special risk or hazard described as a "substantial incline." Accordingly, claimant argues her accident is compensable under the Workers Compensation Act as it arose out of and in the course of employment with respondent.

The only issues before the Board on this appeal are:

1. Did claimant's accident occur on respondent's premises?
2. If not, did claimant's accident occur on the only available route to or from work, which was a route that involved a special risk or hazard and which was a route not used by the public except in dealings with the employer?
3. If this claim is compensable under the Workers Compensation Act, what is the nature and extent of claimant's injury and disability?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the Award and the Nunc Pro Tunc Award should be reversed to deny claimant's request for benefits.

On June 10, 2000, claimant fell and injured her left leg when she stood up from a curb to enter respondent's building and report for work at the start of her workday. A driveway separates the curb where claimant was sitting from the building's side door where claimant intended to enter. According to claimant, when she fell she had one foot on a sidewalk that she believed was owned by a bank and one foot in the driveway that she believed was owned by respondent. Claimant believed respondent owned the driveway because respondent's vehicles used the driveway, respondent had a sign on its building indicating that it was a private drive, and respondent's employees used that area for breaks. Claimant testified, in part:

Q. (Judge Avery) Do you have any knowledge as to whether this driveway is actually owned by Southwestern Bell, or is it owned -- is it a driveway that the public uses at all?

A. (Claimant) The public does not use the driveway.

Q. At least they're not supposed to.

A. Not supposed to.

Q. So Southwestern Bell, if they wanted to, could block off this drive? Is it a drive that they built, or it's owned by them, or do you know?

A. I honestly don't know, sir.

Q. Okay. Have you ever seen them take any kind of action to insure that that driveway is only used by their vehicles?

A. Aside from the "private drive" sign, I don't believe so.

Q. Okay. Well, is it your belief, then, that that driveway is owned or controlled or regulated by them?

A. I would believe so.

Q. Okay, and is the basis of your belief simply that sign, or do you have any other basis for that belief?

A. The sign, as well as that's where all of the Southwestern Bell employees go when they go outside for breaks, generally.<sup>1</sup>

The driveway in question runs past respondent's building towards another building. Claimant testified at the preliminary hearing that she did not know where the driveway led after it passed respondent's building. At the regular hearing, claimant testified that she did not know who owned the driveway.

Accidents occurring while employees are on their way to work are generally not compensable under the Workers Compensation Act. But accidents that occur either on an employer's premises or on the only available route to or from work may be compensable, depending upon the facts.

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's

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<sup>1</sup> P.H. Trans. at 21-22.

negligence. **An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .**<sup>2</sup>  
(Emphasis added.)

The above-quoted statute is a codification of Kansas' "going and coming rule" and provides two exceptions to that rule – a premises exception and a special hazard exception.<sup>3</sup>

The Board concludes that claimant has failed to prove that her accident occurred on premises owned or controlled by respondent. The record indicates the driveway or alley way in question was owned by an unknown person or entity and led to an unknown destination.

Moreover, the record fails to establish that claimant's accident occurred on the only available route to work, which entailed a special risk or hazard and which was a route not used by the public except in dealings with respondent. In addition, the Board specifically finds that the slight incline that allegedly contributed to claimant's fall did not constitute a special risk or hazard as contemplated by the above-quoted statute.

Based upon this record, claimant has failed to carry her burden of proof. Accordingly, claimant's request for workers compensation benefits should be denied.

### **AWARD**

**WHEREFORE**, the Board reverses the April 15, 2002 Award and the April 17, 2002 Nunc Pro Tunc Award and denies claimant's request for benefits.

The Board adopts the order for payment of transcript costs as set forth in the April 15, 2002 Award and the April 17, 2002 Nunc Pro Tunc Award.

**IT IS SO ORDERED.**

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<sup>2</sup> K.S.A. 1999 Supp. 44-508(f).

<sup>3</sup> *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

Dated this \_\_\_\_ day of July 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director